No. 81-870

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THOMAS N. WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Thomas N. Williams, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit (now the Eleventh Circuit Court of Appeals) in this case. The grant of certiorari is required because the decision of the Fifth Circuit is in conflict with its previous decision in United States v. James, 590 F.2d 575 (5th Cir. 1979) and with the decision in United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977) as well as the Fifth Amendment to the Constitution of the United States of America. The decision of the Fifth Circuit Court below prohibits a defendant from testifying in his own behalf at a James Hearing, thus denying a defendant his right of due process.

OPINION BELOW

There was no opinion rendered by the United States Circuit Court of Appeals for the Fifth Circuit (now the Eleventh Circuit Court of Appeals) or the District Court for the Northern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 8, 1981. A timely petition for rehearing en banc was denied on September 10, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1245(1).

QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO TESTIFY AT THE HEARING HELD PURSUANT TO UNITED STATES V. JAMES, 590 F.2d 575 (5th Cir. 1979) IS IN DIRECT CONFLICT WITH PETITIONER'S RIGHT TO TESTIFY IN HIS OWN BEHALF.

2. WHETHER THE TRIAL COURT'S FAILURE TO HOLD THE JAMES HEARING PRIOR TO TRIAL IS IN DIRECT CONFLICT WITH THE HOLDING IN UNITED STATES V. PETROZZIELLO.

STATEMENT OF THE CASE

Petitioner, Thomas N. Williams, was charged by indictment with one count of conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C., §841(a)(1) and 846, and with two counts of possession of cocaine with the intent to distribute, in violation of 21 U.S.C., §841(a)(1). Prior to trial, Petitioner filed several motions including a motion for a pre-trial hearing pursuant to United States v. James, 590 F.2d 575 (5th Cir. 1979). The trial court granted Petitioner's request for a James hearing but refused to allow Petitioner or Petitioner's co-defendant to testify at the hearing.

Petitioner and his co-defendant were tried together. Petitioner was found guilty on all three counts. The trial court sentenced Petitioner to three concurrent 10-year prison sentences, plus a 3-year period of special parole on Counts Two and Three, also to run concurrently.

The trial court denied Petitioner's motion for a new trial and judgment of acquittal. Petitioner timely appealed to the Circuit Court of Appeals for the Fifth Circuit and after the Court per curiam affirmed the District Court, Petitioner timely requested a rehearing en banc which was denied. Petitioner then filed his timely Petition for Certiorari.

In United States v. James, 590 F.2d 575 (5th Cir. 1979) the Court held that the District Court must conduct a hearing to determine whether or not statements of one conspirator may be used against another conspirator at trial. The government has the burden of presenting substantial evidence that a conspiracy exists, that the defendant participated in the conspiracy and that the statements sought to be introduced were made in furtherance of the conspiracy. The hearing required by United States v. James, supra, is no less important than a hearing held on a motion to suppress evidence or to suppress a confession.

Given the significance of the James hearing, the defendant must have the right to testify and present evidence prior to the ruling of the District Judge. In the instant case, the trial court refused to allow Petitioner to either testify or present evidence. By preventing Petitioner from presenting evidence at the "James" hearing, the trial court effectively put Petitioner in the position of having to testify and altering his trial strategy, since the statements were admitted in the presence of the jury prior to the James hearing, over the objections of both defense counsel and the assistant United States Attorney.

REASONS FOR GRANTING THE WRIT

1. THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO TESTIFY AT THE HEARING HELD PURSUANT TO UNITED STATES V. JAMES, 590 F.2d 575 (5th Cir. 1979) IS IN DIRECT CONFLICT WITH PETITIONER'S RIGHT TO TESTIFY IN HIS OWN BEHALF.

The most fundamental right guaranteed a criminal defendant is his right to testify and present evidence in his own behalf or to refuse to do so of his own volition. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971); McKissick v. United States, 379 F2d. 754 (5th Cir. 1967), appeal after remand, 398 F.2d 342 (5th Cir. 1968); Ashe v. State of North Carolina, 586 F.2d 334 (4th Cir. 1978) cert. den. 99 S.Ct. 2416. This right extends to all stages of the criminal proceeding commencing with bond hearings, the arraignment, evidentiary pre-trial hearings such as a Motion to Suppress, and even at the sentencing. This right is founded in a criminal defendant's right to testify in his own behalf, as guaranteed him under the Fifth Amendment to the Constitution of the United States.

In requiring the trial court to conduct a hearing to determine whether or not the statements of one conspirator may be allowed in evidence against a fellow conspirator, there must be presented independent substantial evidence of a conspiracy, that the statements sought to be introduced were made during the course of and in furtherance of the conspiracy, and that the declarant and the defendant must have been members of the conspiracy. United States v. James, supra.

The trial court inexplicably determined that petitioner would not be permitted to testify in his own behalf at the James hearing to determine whether the government had presented sufficient evidence of a conspiracy and petitioner was further prevented from presenting any evidence at the hearing.

If a defendant has the option of testifying or not testifying at every pre-trial stage of the criminal process as well as during the trial itself, there is no rational argument for prohibiting him from testifying in his own behalf at a James hearing.

By denying Petitioner his right to testify at the James hearing, there is an added burden placed on trial counsel in evaluating the testimony of the government's witnesses, conducting his cross-examination and making the determination of whether to allow his client to testify at the trial itself.

2. THE TRIAL COURT'S FAILURE TO HOLD THE JAMES HEARING PRIOR TO TRIAL IS IN DIRECT CONFLICT WITH THE HOLDING IN UNITED STATES V. PETROZZIELLO, 548 F.2d 20 (1st Cir. 1977).

The trial court ignored the request of all counsel, including that of the assistant United States Attorney, that the hearing be held prior to the trial and outside the presence of the jury. During the course of the trial, the Judge allowed the government's witness to testify to two hearsay statements made by Petitioner's co-defendant linking Petitioner to the alleged conspiracy prior to excusing the jury and conducting the James hearing. The holding of United States v. James, supra, in part required the trial judge to make a preliminary determination of whether the government has presented sufficient evidence of a conspiracy before admitting any declarations of a co-conspirator. In United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980) it was held:

"Following the selection of the jury but prior to the examination of the first witness before the jury, the District Court held a hearing to determine the admissibility of certain extra-judicial declarations that the prosecution intended to introduce under the Co-conspirator Rule. Such a hearing is mandated by (James). The purpose of the James hearing is to establish the existence, or non-existence, of the predicates for the admission of a co-conspirator's extra-judicial declaration before the declaration is made known to the jury." Grassi, at page 1300

In United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977) the court succinctly stated the reasons for conducting the James hearing prior to trial and outside the presence of the jury:

"Nothing in the new rules or this opinion requires that the judge's meticulous approach be abandoned. Although time-consuming, it avoids the danger that hearsay will be admitted in anticipation of a later showing of conspiracy that never materializes. 548 F.2d at 23, n. 3.

The purpose for the James hearing is to establish the existence or non-existence of the predicates for the admission of a co-conspirator's extrajudicial declaration before the declaration is made known to the jury. United States v. Grassi, 616 F.2d 1295, 1300 (5th Cir. 1980).

Petitioner realizes that trial courts have a reluctance to engage in "mini-trials" wherein they perceive a loss of time in the handling of their trial dockets. This reluctance is misplaced, however, when it results in prejudice to the petitioner by having hearsay statements of government witnesses allowed in testimony before the jury concerning a

conspiracy before the holding of the James hearing and then requiring the hearing to be held in such a manner that trial counsel is hampered in his cross-examingtion of government witness and his trial strategy because of a possible adverse effect on the jury.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

AO 245
(Rev. 5/85)

United States of America vs.

United States District Court

for

THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DEFENDANT: THOMAS NELSON WILLIAMS

DOCKET NO. PCR 89-420-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government, the defendant appeared in person on this date: 11 25 90

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL JAMES S. TWOMEY, ESQUIRE
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE. ☒ NOT GUILTY

FINDING & JUDGMENT

There being ☐ findings/☐ verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of from on or about June 18, 1990 up to and including June 25, 1990 in the Northern District of Florida and elsewhere, knowingly and unlawfully combining, conspiring and agreeing with others to unlawfully possess cocaine with the intent to distribute same in violation of Title 21, U. S. Code, Sections 846 and 841(a)(1) as charged in Count One (1) of the Superseding Indictment; and on June 19 and 25, 1990 in the Northern District of Florida, unlawfully and intentionally possessing cocaine with the intent to distribute same in violation of Title 21, U.S. Code, Section 841(a)(1) as charged in Counts Two (2) and Three (3) of the Superseding Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on Count One (1) of the Superseding Indictment and the defendant shall become eligible for parole at such time as the U. S. Parole Commission may determine under Title 18, U. S. Code, Section 4205(b)(2); that the defendant be so committed for a period of ten (10) years on each of Counts Two (2) and Three (3) of the Superseding Indictment and the defendant shall become eligible for parole at such time as the U. S. Parole Commission may determine under Title 18, U. S. Code, Section 4205(b)(2) and in addition thereto and pursuant to the applicable statutes, there is also hereby imposed a special parole term of three (3) years in addition to the aforesaid term of imprisonment as to Counts Two (2) and Three (3) of the Superseding Indictment, with the sentences imposed herein as to Counts two (2) and Three (3) of the Superseding Indictment to run concurrently with each other and concurrently with the sentence imposed herein as to Count One (1) of the Superseding Indictment.

SPECIAL CONDITIONS OF PROBATION

It Is Further ORDERED and ADJUDGED that the original Indictment in this matter be, and the same is hereby, dismissed upon motion of the U. S. Attorney.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out in General Order No. 83-1 adopted by this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of supervision, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

TERMINATION OF CRIMINAL ACTION

The court orders commitment to the custody of the Attorney General and recommends,

I hereby certify that the foregoing is a true and correct copy of the original and I further certify that I am the duly appointed and qualified Clerk of this Court.

FURNISHED A TRUE COPY OF

10

SIGNED BY
☒ U.S. District Judge
☐ U.S. Magistrate

VINSON E. ALLEN, Chief Judge

11/25/90

DATE ENTERED 11/25/90

Clerk

☐ DEPUTY

APPENDIX B

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

- - -

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-5941

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS NELSON WILLIAMS,
MICHAEL DELNO SCHRIEVER,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Florida

(July 8, 1981)

Before HILL and VANCE, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.

* District Judge of the Northern
District of Alabama,
sitting by designation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-5941

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS NELSON WILLIAMS,
MICHAEL DELNO SCHRIEVER,

Defendants-Appellee.

- - - - -

Appeal from the United States District Court for the
Northern District of Florida

- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 8, 5 Cir., 1981, F.2d).

(September 10, 1981)

Before HILL and VANCE, Circuit Judges and LYNNE, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16, Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 1981, copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and to Thomas Santurri, Esquire, Assistant United States Attorney, 100 North Palafox Street, Pensacola, Florida 32501.

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